Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

January Term, 1979

No. 78-1085

COMMONWEALTH OF KENTUCKY - - Petitioner

versus

JAMES RONALD AVERY - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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SUPREME COURT OF THE UNITED STATES

January Term, 1979

No._____

COMMONWEALTH OF KENTUCKY - - *Petitioner*

v.

JAMES RONALD AVERY - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The petitioner, the Commonwealth of Kentucky, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kentucky reversing the conviction of the respondent in the Jefferson Circuit Court at Louisville, Jefferson County, Kentucky.

OPINION BELOW

The Trial Court rendered no written opinion in this case. A Memorandum Opinion Per Curiam was rendered by the Kentucky Supreme Court on July 25, 1978. It is printed in the appendix to this petition beginning at page 15. The Mandate of the Supreme Court of Kentucky denying the Petitioner's motion for rehearing and modification appears in the appendix at page 18.

JURISDICTION

The Judgment of the Kentucky Supreme Court was entered on July 25, 1978. A timely petition for rehearing and modification was denied by that Court on October 10, 1978. The jurisdiction of this Court is invoked pursuant to 28 USC § 1257(3).

QUESTION PRESENTED

Whether the Kentucky Supreme Court Misinterpreted and Misapplied to This Case the Prior Decision of This Court in *Taylor* v. *Kentucky*, 436 U. S. ____, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978)?

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent was convicted on a six-count indictment for events that transpired on April 24, 1977 while committing armed robbery at a Convenient Food Market, Taylor Boulevard, Louisville, Kentucky, and while

kidnapping some unsuspecting occupants of a vehicle utilized to effectuate escape from hot pursuit.

At approximately 11 p.m. the Respondent, Mr. Avery, and his accomplice, entered the market, masqueraded by nylon stockings pulled over their heads, and Respondent, armed with a .22 caliber revolver, ordered the checker, Brenda Smith, to empty the cash register and the manager to open the safe. Brenda described the Respondent as follows:

> He was about medium build, about 5′7″ or 5′8″ tall, and he had dark hair and he had a mustache.

When asked to make an in-court identification, she stated that the Respondent resembled the armed robber "but I couldn't be positive."

Fortuitously, Officer James C. Cain, while off duty, had entered the same market to purchase some soft drinks, when Respondent pointed the gun at the officer's head and caused him to recline face down, extracting of all items the officer's badge case from his hip pocket. Officer Cain pursued the Respondent and his accomplice, who had fled on foot, to a traffic intersection. There he observed the Respondent and his companion enter the back seat of a vehicle, awaiting a green traffic signal. Officer Cain described the Respondent as:

> . . . a white male approximately 5′10″ slender build, wearing a stocking mask, had on a pair of dark gloves, and he had in his hand a .22 calibre revolver with 4-inch barrel, ...

* * * * * * *

> . . . he had a high forehead. His hair was wavy, and he had it behind his ears, kinda' like, and it was wavy. His forehead was very high. The jaw bone is a distinct looking feature about the jaw bone, and his nose looked like it was smashed and kind of distorted like, and the side burns were a flair type just below the earlobe.

Officer Cain positively identified Commonwealth's Exhibit 1, the revolver used in the armed robbery and unequivocally made an in-court identification of Respondent. On cross, Officer Cain stated that although he viewed Mr. Avery only for 10-15 seconds before he was forced to lie on the floor, he directed his attention to Respondent and "tried to concentrate my efforts on his face and the head area."

After having abruptly jumped into the back seat of a vehicle waiting at a traffic signal and having startled its occupants, Mr. and Mrs. McCandless, the Respondent commandeered the car with armed persuasion. Effectively evading the police, he ordered the couple to exit and stole their car.

Although Mrs. Candless was able to state that the armed intruder was in his twenties, slenderly built, with dark hair, she was unable to positively identify Respondent in court.

Mr. McCandless stated that the Respondent, upon entry into the vehicle, uttered "Turn around and drive or I'll kill you right here." The victim was unable to make a positive in-court identification, although he testified that Mr. Avery's features resembled the man that gained entry to his vehicle.

It was established that Officer Wegenast arrested the Respondent on July 6, 1977, based upon additional investigative work.

The defense presentation consisted of Kenneth Probst, who allegedly sold Commonwealth's Exhibit 1, the revolver, to the Respondent in mid-May of 1977, and the Respondent, himself, who denied total involvement.

It was pointed out to the Kentucky appellate court: that the voir dire was not reported in the record on appeal by mutual agreement of counsel; that the jury instructions were prefaced by the reasonable doubt standard; that reasonable doubt was defined for the jury; that the standard of reasonable doubt was referenced by defense counsel in his closing argument and by the Assistant Commonwealth's Attorney during his summation.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Kentucky has misinterpreted and incorrectly applied a prior decision of this Court, *Taylor* v. *Kentucky,* 436 U. S. ——, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (rendered May 30, 1978), to the case at bar. In *Whorton* v. *Commonwealth,* Ky., 570 S. W. 2d 627 (rendered July 25, 1978) the Supreme Court of Kentucky interpreted *Taylor* v. *Kentucky* "to mean that when an instruction on the presumption of innocence is asked for and denied there is reversible error."[1]

[1]The petitioner has previously filed a Petition for Writ of Certiorari to the Supreme Court of Kentucky based upon that court's decision in *Whorton* v. *Commonwealth,* which is now pending before this Court in *Commonwealth of Kentucky* v. *Harold*

(Footnote continued on following page)

(Id. at 633). The foregoing interpretation of *Taylor* v. *Kentucky* requires *automatic reversal* in every criminal case where a request for such an instruction is denied regardless of the circumstances of the case or the possible application of harmless error principles. The petitioner respectfully submits that such an interpretation of *Taylor* v. *Kentucky* is incorrect.

In *Taylor* v. *Kentucky,* 436 U. S. ——, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (rendered May 30, 1978), this Court held that *under the facts* of that case a Kentucky conviction had to be reversed when a request for a presumption of innocence instruction had been refused by the trial court. One June 7, 1978, a week after the *Taylor* decision had been rendered by this Court, *Whorton* v. *Commonwealth* came before the Supreme Court of Kentucky for oral argument.[2] One of the issues of that case was whether the trial court erred in refusing to grant a requested instruction on presumption of innocence. The Supreme Court of Kentucky subsequently rendered its Opinion on July 25, 1978, in *Whorton* v. *Commonwealth,*[3] and, with respect to the presumption of innocence instruction issue, stated as follows:

> "In *Taylor* a judgment of the Franklin Circuit Court was reversed because the trial court declined to instruct the jury that the law presumes a defendant innocent—and this despite the fact that on *voir dire* the jurors had already signified that they understood that proposition.' If the trial court's 'truncated discussion of reasonable doubt . . . was hardly a model of clarity,' as remarked in *Taylor,* we must confess that we have a similar difficulty with the *Taylor* opinion itself.
>
> The dissenting members of our court feel that the holding in *Taylor* is confined to the facts of the case. They draw that inference from the next-to-last sentence of the opinion (emphasis added): 'We hold that *on the facts of this case* the trial court's refusal to give petitioner's requested instruction in the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment.'
>
> Admittedly, the weight of evidence against Whorton was far greater than it was against the defendant in *Taylor.* But does the Supreme Court actually mean to suggest that a defendant's right to the instruction can be made, ultimately, to stand or fall on the weight of the evidence in a given case? If so, then every case in which the trial court refused to give it will have to be decided

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Whorton, October Term, 1978, No. 78-749. A similar petition, also presently pending before this Court, is *Commonwealth of Kentucky* v. *Ralph Brannon,* October Term, 1978, No. 78-750. The issue presented in the *Whorton* and *Brannon* petitions is the same as that presented in the instant petition.

[2]After the decision in *Taylor* v. *Kentucky* by this Court, but before the issuance of the opinion in *Whorton* v. *Commonwealth* by the Kentucky Supreme Court on July 25, 1978, the Kentucky Court of Appeals—an intermediate state appellate court—*affirmed* convictions in two cases involving requested instructions on presumption of innocence wherein that court distinguished *Taylor* v. *Kentucky* on its facts. *Gully* v. *Commonwealth,* File No. CA-2048-MR, and *Stewart* v. *Commonwealth,* File No. CA-1963-MR. These cases were not to be published, and are not cited here as authority, but to apprise this Court chronologically of the impact of *Taylor* v. *Kentucky* in Kentucky.

[3]On the same day as the *Whorton* decision the Supreme Court of Kentucky also reversed the instant case and *Williams* v. *Commonwealth,* File No. 78-SC-68-MR by Memorandum Opinions. In both cases requests for instructions on presumption of innocence were denied by the trial court. Petitioner intends to also file a Petition for Writ of Certiorari in *Williams.*

according to the Chapman-Harrington harmless-error test. If that was the intention, it would have been considerate of the court to say so. It may be that the question of harmless error was not argued in that case, but 'a model of clarity' would have left a clean cut rather than a jagged stump. After all, it might reasonably have been foreseen that this court would have to apply the decision to a goodly number of other cases then in the process of appeal in this state, Whorton's being but one of them.

Those of us in the majority would like to be able to hold that this newly-declared constitutional requirement is subject to the harmless-error rule, but we are afraid it might not stick. We know very well that in actuality Taylor was no more 'prejudiced' in his case than Whorton was in this one. Yet *Taylor* contains no hint that it might have been appropriate to consider whether the error was in fact prejudicial. To bring this discussion to a merciful end, we read *Taylor* to mean that when an instruction on the presumption of innocence is asked for and denied there is a reversible error. If it means something short of that, we shall welcome further enlightenment from the only source that seems to be able either to construe or to amend the Constitution.

The judgment is reversed with directions for a new trial."

The aforementioned language in *Whorton* constituted an unexpected and surprise interpretation of *Taylor* v. *Kentucky* by the Supreme Court of Kentucky and petitioner thereafter filed a Petition for Rehearing and Modification in *Whorton* urging the court to apply the

harmless-error doctrine. However, the petition was subsequently denied on October 10, 1978, and a Petition for Writ of Certiorari is now pending before this Court, styled *Commonwealth of Kentucky* v. *Harold Whorton.* The instant case, wherein respondent urged two (2) separate allegations of error on appeal, was reversed by the Supreme Court of Kentucky, citing *Taylor* and *Whorton,* solely upon the trial court's refusal to give the requested instruction on presumption of innocence without regard to the circumstances of this case. This Petition for Writ of Certiorari now results. Compare *Herndon* v. *Georgia,* 295 U. S. 441 (1935).

It is the position of the petitioner that the Supreme Court of Kentucky has misinterpreted the meaning of *Taylor* v. *Kentucky* in *Whorton* v. *Commonwealth* and has misapplied that case to the one at bar. This misinterpretation of *Taylor* v. *Kentucky* poses a serious hindrance to the effective administration of criminal justice in Kentucky and will require the *automatic reversal* of numerous state criminal convictions where the accused requested, but was denied, an instruction on presumption of innocence.

In the case at bar, the respondent was convicted on three counts of armed robbery for his part in the April 24, 1977, holdup of a Convenient Food Market and two counts of kidnapping for commandeering an occupied vehicle while effectuating his escape. His convictions were based primarily on the strength of the positive in-court identification of an off-duty Louisville police officer who was an eyewitness to the crimes. Indeed,

Mr. Avery requested an instruction on the presumption of innocence, but received only the customary instruction on reasonable doubt; however, unlike *Taylor* there is no suggestion in the case at bar that the prosecutor acted in an improper fashion during closing argument or at any other time. Nor, were there any harmful inferences made with respect to references in the indictment as in *Taylor*. And, there are no suggestions in this case of Avery's status as a defendant tending in itself to establish his guilt like those that occurred in the *Taylor* case. Finally, the totality of the evidence in this case, unlike *Taylor,* cannot be described as a mere swearing contest between just one victim and the accused.

Perusal of the decision of this Court in *Taylor* v. *Kentucky* seems to indicate that that decision turned solely upon its rather unique and unusual facts. The numerous extraneous circumstances which occurred during the trial in the *Taylor* case were specifically noted by this Court and, *when they were considered together,* appeared to establish the basis for the violation of Taylor's constitutional rights. The petitioner maintains that no such constitutional violation would necessarily occur. This is particularly true in the case at bar where, as just previously noted in detail, the circumstances of this case are not all similar to those in *Taylor* v. *Kentucky*. Therefore, this case should have been considered on its own facts and circumstances and not automatically reversed because the trial court refused to give the requested instruction on presumption of innocence.

However, the Supreme Court of Kentucky has interpreted *Taylor* v. *Kentucky* to mean "that when an instruction on the presumption of innocence is asked for and denied there is a reversible error." Under the decision of the Supreme Court of Kentucky in *Whorton* the respondent's conviction in this case and in every case pending in Kentucky must be *automatically reversed* without regard to the circumstances of the case, the nature of the evidence adduced at trial, or the manner in which the case was prosecuted and defended by counsel or presided over by the trial court. The petitioner submits that this interpretation of *Taylor* v. *Kentucky* as set out by the Supreme Court of Kentucky in the *Whorton* case is incorrect and that this Court should grant a writ of certiorari to review this matter and to correct the *Whorton* decision. Compare *Republic Steel Corp.* v. *Maddox,* 379 U. S. 650, 652 (1965). Specifically, the judgment of the lower court should be reversed and vacated with respect to the Taylor issue to be reconsidered in light of applicable harmless-error cases of this Court such as *Harrington* v. *California,* 395 U. S. 250 (1969), and *Chapman* v. *California,* 386 U. S. 18 (1967).[4]

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[4]In its Petition For Rehearing and Modification before the Supreme Court of Kentucky in *Whorton,* the petitioner estimated that between 20 and 80 criminal cases would be automatically reversed due to that court's interpretation of *Taylor* v. *Kentucky* in *Whorton* v. *Commonwealth*. Such automatic reversal under *Whorton* has recently been applied to *Miller* v. *Kentucky,* No. 77-6912, wherein this Court granted an accused's Petition for Writ of Certiorari on October 2, 1978, reversed and vacated the judgment of the Supreme Court of Kentucky, and ordered that the case be reconsidered in light of *Taylor* v. *Kentucky*. *Miller's* conviction had been *affirmed* by the state appellate court *before* this Court

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It is the position of the petitioner that *Taylor* v. *Kentucky* does not mean that a state criminal conviction in Kentucky must be reversed automatically when a requested instruction on presumption of innocence is refused by the trial court. It is our belief that *Taylor* v. *Kentucky* does not create a rule of law requiring such an instruction as a *sine qua non* in Kentucky criminal cases.[5] In fact, it appears to the petitioner that under *Taylor* v. *Kentucky any alleged federal constitutional impact of such an instruction,* whether requested or not, *would depend wholly on the circumstances of each criminal case and it would be only in those cases having exceptional circumstances, such as in Taylor* v. *Kentucky, where the absence of such instruction whether requested or not would result in a violation of an accused's right to due process under the Fourteenth Amendment to the United States Constitution.* The Supreme Court of Kentucky in its Opinion in *Whorton* v. *Commonwealth* has clearly misinterpreted the decision of this Court in *Taylor* v. *Kentucky.* But even in the decision in *Whorton* v. *Commonwealth,* the Supreme Court of Kentucky clearly indicated that it was unsure of the meaning and import of this Court's decision in *Taylor* v. *Kentucky* and would welcome "further enlightenment" from this Honorable Court with respect to what *Taylor* v. *Kentucky* means.

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rendered its decision in *Taylor.* Upon remand from this Court to the Supreme Court of Kentucky, Miller's conviction was automatically reversed on November 21, 1978, based upon *Whorton.* A Petition for Rehearing and Modification based upon that reversal is presently pending in the Supreme Court of Kentucky.

[5]The Supreme Court of Kentucky amended Kentucky Rule of Criminal Procedure 9.56, effective July 1, 1978, requiring a presumption of innocence instruction in every criminal case. That Rule reads as follows:

"(1) In every case the jury shall be instructed substantially as follows: 'The law presumes a defendant to be innocent of a crime, and the indictment [or other accusatory document] shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty [and if you find him guilty but have a reasonable doubt as to the degree of the offense of which he is guilty, you shall find him guilty of the lower degree].'

"(2) The instructions should not attempt to define the term 'reasonable doubt'."

CONCLUSION

For the foregoing reasons the petitioner respectfully submits that this Court should grant a writ of certiorari in this case in order to rectify the misinterpretation and application by the Supreme Court of Kentucky of *Taylor* v. *Kentucky* with the case at bar.

Respectfully submitted,

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PROOF OF SERVICE

I, Miles H. Franklin, one of counsel for the petitioner, hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, this 5th day of January, 1979, to Hon. Terrence R. Fitzgerald, Chief Appellate Defender of the Jefferson District Public Defender, 200 Civic Plaza, 701 West Jefferson Street, Louisville, Kentucky 40202, and Daniel T. Goyette, Deputy Defender, Jefferson District Public Defender, 200 Civic Plaza, 701 West Jefferson Street, Louisville, Kentucky 40202, Counsel for Respondent.

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Assistant Attorney General

APPENDIX

SUPREME COURT OF KENTUCKY

RENDERED: JULY 25, 1978

78-SC-68-MR

BARRY VAUGHN WILLIAMS - - - - *Appellant*

Appeal From Jefferson Circuit Court
v. Honorable George H. Kunzman, Judge
Indictment No. 154525

COMMONWEALTH OF KENTUCKY - - - *Appellee*

AND

78-SC-75-MR

JAMES RONALD AVERY - - - - - *Appellant*

Appeal From Jefferson Circuit Court
v. Honorable S. Rush Nicholson, Judge
Indictment No. 159541

COMMONWEALTH OF KENTUCKY - - - *Appellee*

MEMORANDUM OPINION PER CURIAM
REVERSING—Docketed July 25, 1978

We consider here today two criminal appeals arising from completely unrelated occurrences in Jefferson County, Kentucky. Although each case has been treated separately up to this point, inasmuch as the same legal issue is dispositive in both, we deem it appropriate to consolidate them for purposes of this opinion.

The appellant in No. 78-SC-68-MR, Barry Vaughn Williams, was convicted on the strength of the victim's dying declarations and the testimony of two eyewitnesses, of voluntary manslaughter in connection with the September 14, 1974, shooting of one Kenneth Smith following a heated dispute over a mutual female acquaintance. Williams' punishment was fixed at 21 years' imprisonment. At his trial,

the indictment against him was read to the jury, and the prosecuting attorney made several remarks during his summation branding Williams as a professional criminal and imploring the jury to convict him as an example to other members of the underworld. Despite Williams' request that the jury be instructed on the presumption of innocence and lack of evidentiary value of an indictment, the jury was given only the instruction on reasonable doubt required by RCr 9.56 as it existed at that time.

The appellant in No. 78-SC-75-MR, James Ronald Avery, was convicted of three counts of armed robbery for his part in the April 24, 1977, holdup of a Convenient Food Mart and two counts of kidnapping for commandeering a car while effectuating his escape. His convictions were based primarily on the positive in-court identification of an off-duty Louisville police officer who was an eyewitness to the crime, and resulted in consecutive 20-year sentences on each count. Avery too requested an instruction on the presumption of innocence but received only the customary instruction on reasonable doubt.

In light of the recent decision of the United States Supreme Court in *Taylor* v. *Kentucky*, ____ U. S. ____, ____ S. Ct. ____, ____ L. Ed. 2d ____ (decided May 30, 1978), we believe that the refusal by the trial court in each of these cases to instruct the jury on the defendant's right to be presumed innocent unless proven guilty beyond a reasonable doubt constituted error, and feel that we have no alternative but to grant each appellant a new trial. *See Whorton* v. *Commonwealth*, Ky., ____ S. W. 2d ____ (decided today).

At those new trials, the trial court shall instruct the jury as required by the newly amended version of RCr 9.56 (effective July 1, 1978).

The judgments against both appellants Williams and Avery are reversed, and their cases remanded for new trials.

All concur except Clayton, J., who dissents for the reasons stated in his dissenting opinion in *Whorton*.

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SUPREME COURT OF KENTUCKY

OPINION RENDERED: JULY 25, 1978

File No. 78-SC-75-MR

JAMES RONALD AVERY

v.

COMMONWEALTH OF KENTUCKY

Appeal From Jefferson Circuit Court
Action No. 159541

MANDATE—Issued October 10, 1978

The Court being sufficiently advised, delivered herein an opinion per curiam, and it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed for proceedings consistent with the opinion herein; which is ordered to be certified to said court.

October 10, 1978—Appellee's Petition for Rehearing Denied.

(s) Martha Layne Collins, Clerk